IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.412 of 1997
and
C.M.P.No.4959 of 1997

K.Durai .. Appellant/Defendant

vs.

Valliammal .. Respondent/Plaintiff

Prayer: This second appeal has been preferred against the Judgment dated 13.12.1996 in A.S.No.34/1995 passed by the Subordinate Judge, Thiruvellore, reversing the decree and judgment dated 22.8.1995 in O.S.No.662/1987 on the file of the District Munsif, Ponneri.

For Appellant : Mr.N.R.Gopalan

For Respondent : Mr.M.Venkatachalapathy, Senior Counsel,
for Mr.D.Rajendran

JUDGMENT

This second appeal has been preferred against the decree and judgment in A.S.No.34/1995 on the file of the Court of the Subordinate Judge, Thiruvellore. The defendant, in O.S.No.662/1987 on the file of the Court of District Munsif, Ponneri, is the appellant herein. The plaintiff has filed the suit in O.S.No.662/1987 for an order of permanent injunction in respect of the plaint schedule property.

2. The short facts of the case of the plaintiff in the plaint relevant for the purpose of deciding this appeal are as follows:-

The plaint schedule house bearing Door No.24 in S.No.8/2 in Sasthri Nagar, Periasekkadu Village, Madavaram, belongs to the plaintiff. The property tax is being levied in the name of the plaintiff. 'B' memos are issued and kist are paid in the name of the plaintiff. The plaintiff is in absolute possession and enjoyment of the suit property for the past 16 years. The defendant, who is the distant relative of the plaintiff, is residing near Madras city. On the evil advise of some local people he wanted to grab at the suit property and attempted to put up a hut on 2.11.1987 which was prevented by the plaintiff. Again on 9.11.1987, he

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attempted for the second time to trespass into the property. Therefore the plaintiff was obliged to prefer a police complaint on 9.11.1987 with J-3, Police Station in M.M.Colony, Madhavaram. When the Police asked the defendant to show the documentary evidence in respect of the suit property, he could not produce any document and also failed to appear before the police officials. The plaintiff was asked by the police to approach the Court for appropriate remedy. The defendant is making attempt to trespass into the suit property and he is trying to put up a hut by force. The defendant has no right what so ever over the suit property. Hence, the suit.

3. The defendant in is written statement would contend as follows:-

3(a) The defendant is not residing at the address shown in the plaint. He is residing only in the suit property. The defendant is aged 29 years. The defendant was not served with summon, notice and service copies. The plaintiff attempted to dispossess the defendant by approaching the police with the ad-interim injunction order. At that time the defendant noted down the suit number and engaged the counsel. The plaintiff has intentionally given wrong address as hers. The plaintiff is residing only at Perumal Koil Street, in Periasekkadu. The plaintiff's husband is in possession of the site to the north of the suit land. The superstructure therein has been letout. Designedly the door number of that house and the house in the suit property in which the defendant is residing have been shown as the place of residence of the plaintiff. The suit and further proceedings are to be stayed till the plaintiff gives her correct address.

3(b) The suit land cannot be owned absolutely by anybody till the Government grants patta. The suit land is classified as assessed waste. The plaintiff's husband Perumal is the maternal uncle of the defandant. He is the younger brother of the defendant's mother Ellammal. Ellammal was given in marriage at Ramavaram village near Nandhambakkam. The defendant is the youngest issue of his mother. When he was about 1 ½ years of age his father expired. His mother chose to move to Periasekkadu village. On her own she occupied the suit land which was Government land. She was residing there along with her children. The eldest sister and the next one of the defendant were given in marriage only from that house. The defendant's mother was doing vegetable vending business and apart from that any seasonal business during day time. She died about 9 years ago. The plaintiff's husband had occupied the land immediately north of the suit land. He had been lettingout the superstructure. The plaintiff's husband was a chief mason in the locality. The defendant's mother used to pay the tax and charges to the Government through him at times. They were very cordial. A few years before the death of Ellammal she was ill intermittently. She used to reside in her sister's house in Agraharam village. The plaintiff's husband used to look after the suit property on her behalf.

3(c) After the death of the mother the defendant alone stayed in the suit house. His immediate elder sister was brought up by his junior maternal aunt. In fact the defendant was very cordial towards his uncle's family. The plaintiff herself used to attend to the needs of the

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defendant. The defendant too used to leave the payment of property tax to the house and charges to the Government through his uncle. The property tax assessment has been only in the name of the defendant's mother Ellammal.

3(d) The defendant is doing welding work and earning Rs.900/- per month. The plaintiff wanted the defendant to marry her daughter. The plaintiff has four sons and one daughter. Perhaps she thought that her daughter is given in marriage to the defendant she will be in the same village. But the defendant did not feel like marrying the girl who was practically brought up with him. The plaintiff is bent up on harassing the defendant and causing hardship to him since then. The plaintiff gave her daughter in marriage to her close relative in or about the first week of November 1987 with created, altered and corrected documents, suppressing the fact that the site was in the possession of the defendant's mother and only the defendant is in possession. Even from 1987, 'B' memo was given only to the defendant as he is in possession.

3(e) Receipts and documents of the defendant's mother which were with the plaintiff's husband have been used for filing the suit after forging the same. After filing the suit and obtaining exparte ad-interm injunction the documents were taken back from the Court. The name of the defendant's mother in the receipts filed along with the suit appear to have been tampered with. Only after a memo was filed for production, the said documents were produced. The very fact that the documents have been tampered with would go to show that the suit is a cooked up one. The plaintiff has no possession to be intereferewith. Hence the suit is liable to be dismissed.

4. On the above pleadings the learned trial Judge has framed four issues for trial. On the side of the plaintiff, Ex.A.1 to A.7 were marked. The plaintiff has examined herself as P.W.1. On the side of the defendant, defendant has examined himself as D.W.1 and exhibited Ex.B.1 to B.6. After going through the available evidence both documentary and oral, the learned District Munsif has held that the plaintiff is not entitled to an order of permanent injunction and consequently dismissed the suit without costs. Aggrieved by the findings of the learned District Munsif, the plaintiff preferred an appeal in A.S.No.34/1995 before the Subordinate Judge, Thiruvellore. The first appellate Court after due deliberations has allowed the appeal thereby dismissing the suit in O.S.No.453/1995 after setting aside the decree and judgment of the trial Court. Hence the present second appeal.

5. The substantial questions of law involved in this second appeal are as follows:-

i) Whether the first appellate Court was justified in law in reversing the judgment and decree of the trial Court relying on the document filed by the plaintiff/respondent without establishing that the said documents related to the suit property?

ii) Whether the learned appellate Judge was right in law in reversing the judgment and decree of the trial Court without

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disclosing the reasons given by the trial Court and that too by drawing a wrong inference even from the proved facts?

6.The Point:-

6(a) The only point urged before this Court by the learned counsel appearing for the appellant is that in spite of his production of documents to show his possession in respect of the suit property, the learned first appellate Court has dismissed his claim. The relation between the parties are admitted. The plaintiff is the wife of the younger brother of Ellammal, the mother of the defendant. So to say the suit has been filed by the wife of the maternal uncle of the defendant.

6(b) The learned counsel would contend that the plaint schedule property is a Government poramboke and hence the Government is the owner of the property. Since the Government was not added as a party, the plaintiff's suit is liable to be dismissed on that ground. It is to be noted that the suit has been filed by the plaintiff not for declaration but only for an order of injunction. The suit property is D.No.24 in S.No.8/2 Sasthri Nagar, Periasekkadu measuring 80 feet x 30 feet. The plaintiff to show her possession in respect of the suit property has produced Ex.A.1(series), land tax receipts dated 27.02.1985, 18.2.1983, 5.2.1987, 13.2.1984 and 9.2.1986. The learned trial Judge has held that out of the tax receipts produced by the plaintiff under Ex.A.1(series), the tax receipts dated 18.2.1983 and 13.2.1984 bear the name of the defendant. On that score the learned trial Judge has held that the land tax has been paid only by the defendant for the suit property which will lead to an inference that the defendant is in possession of the suit property. But a perusal of the tax receipts dated 18.2.1983 and 13.2.1984 will clearly go to show that even though the defendant's name has been mentioned in those land tax receipts in column No.1 which is intended for mentioning the name of the person who pays the tax. But the tax has been levied only for P.Valliyammal is seen from those tax receipts itself.

6(c) The other objection raised by the learned counsel appearing for the appellant is that in Exs.A.2 to A.4, house tax receipts, door No.24 is not mentioned but in Ex.A.3 Door No.26 has been mentioned. It is the definite case of the plaintiff that the defendant is her husband's sister's son and the defendant's mother Ellammal was residing at Nanthambakkam and after her death the defendant has sifted her residence to Villivakkam.

6(d) The learned senior counsel appearing for the respondent would draw the attention of this Court to the address given for the defendant-K.Durai in long cause title and represented that the defendant is residing at D.No.57, East Mada Street, Villivakkam to which address, the sommons in the suit were served and defendant appeared in the Court after receiving the sommons and that this will go to show that the defendant is not residing in the suit property which is situated at Door No.24, Sasthri Nagar, Periasekkadu, Madhavaram. The defendant as D.W.1 in the cross-examination would admit that Door number for the suit property is 24 and that he has not aware in whose name the house tax for Door No.24

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has been paid. He would admit that even in Ex.B.2-property tax register relating to the years 1982-83 to 1986-87 the door number has not been mentioned. Even in Ex.B.2 only the name of the mother of the defendant alone is mentioned, who is said to be residing at No.5, Sasthri Nagar. D.W.1 would admit that Ex.B.5- Ex.B.6, tax receipts, are subsequent to the filing of the suit. So we cannot attach much importance to the documents which are subsequent to the filing of the suit. The motive according to the learned counsel appearing for the appellant, for the plaintiff, to file the suit against the defendant is that the defendant has refused to marry the daughter of the plaintiff. But without the ipsi-dixit of D.W.1, there is absolutely no evidence on record to prove this aspect. On the other hand P.W.1 in his evidence has denied the suggestion put to her in this regard.

6(e) The learned counsel appearing for the appellant relying on 2002(3) CTC 462 (Kumari Anandan Vs. Dr.T.balamukunda Rao (died) and 3 others), contended that the plaintiff must stand or fall on its own merits de-hors inherent weakness in defence case. The facts in the said case in brief are as follows:-

> "The plaintiff has filed C.S.No.495 of 1980 for specific performance of a contract and for a direction to the Defendants to receive the balance sale consideration of Rs.1,45,000/- and to execute sale deed in his favour in respect of the suit property in that case,which consist of ground and first floor together with an out house and for recovery of possession of the out house in the suit property. It is a case of the plaintiff that he started a political party known as Gandhi Kamaraj National Congress on 18.6.1978. After formation of the said party, he was searching for suitable accommodation for the party's office. The defendants are the owners of the suit property. The defendants have orally agreed to sell the same to the plaintiff for a consideration of Rs.2,70,000/- in or about the end of June 1978. It is also agreed between the parties to complete the sale on or before 31.12.1979. The defendants have handed over the copies of the title deeds marked as Exs.P.1 to P.7 and also delivered possession of a portion of the suit property namely ground floor to enable him to house is party's office. One tenant namely Chitramahal Krishnamoorthy was in occupation of the upstair portion, the other two tenants namely Gowri and Ghyare were in occupation of the out house. The plaintiff has also carried out certain repairs in the building and opened the party's office on 5.7.1978. The plaintiff started collecting funds for the purchase of the suit property and made payments to the tune of Rs.1,25,000/- on various dates. The tenant in occupation of the upstair portion vacated in 1979, possession of the same was delivered to the plaintiff by the defendant; that the defendants promised to deliver vacant possession of the out house by 15.11.1979 and promised to execute the sale deed after receiving the balance sale consideration. As instructed by the defendants, the plaintiff

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has also purchased requisite stamp papers and the plaintiff was ready and willing to pay the sum of Rs.1,45,000/- towards the balance of sale consideration, but the defendants were postponing the delivery of vacant possession of the out house. Later, the defendants have agreed to execute the sale deed on 15.2.1980 and to deliver possession. As 15.2.1980 was considered as an inasuspicious day, the plaintiff, who was then away from Madras had issued a telegram to the defendants and requested them to postpone the execution of the sale deed to the next auspicious day. On return to Madras, the Plaintiff approached the defendants evading the execution of the sale deed, consequently a lawyer's notice Ex.P.14 dated 15.3.1980 was issued calling upon the defendants to execute the sale deed. The defendants have also sent a reply Ex.P.15 dated 25.3.1980 with false allegations, immediately a rejoinder Ex.P.16 dated 11.4.1980 was sent by the plaintiff to the defendants denying all the allegations. Subsequently, the 2nd defendant has sent a separate reply notice dated 24.4.1980 reiterating the allegations made in their earlier reply. The defendants have demanded excess payment of Rs.90,000/- without any basis, which was not agreed upon by the plaintiff. The Plaintiff has also deposited the balance of sale consideration of Rs.1,45,000 in Canara Bank T.Nagar, Madras and filed the suit.

The first defendant in his written statement contended that there was no privity of contract between him and the plaintiff and no agreement of sale was entered into with the plaintiff. The plaintiff was not entitled to the relief of specific performance. The suit is not maintainable as the same was filed in the name of the plaintiff, though it is alleged that the agreement was entered into by the plaintiff to purchase the suit property for the benefit of the political party namely Gandhi Kamaraj National Congress. The defendant never agreed to sell the suit property for a sum of Rs.2,70,000/- to the plaintiff; that when the ground floor of the suit property fell vacant, one Perumal Nadar approached him through a broker for leasing out the same to one Paul Durai, who has married the plaintiff's sister. The said Perumal nadar has married the sister of said Paul Durai. An agreement of lease was entered into for a period of 11 months in respect of the ground floor between the first defendant and Paul Durai, marked as Ex.D.1 dated 22.06.1978. Under the said agreement, Paul Durai agreed to pay a sum of Rs.750 towards monthly lease amount. In pursuance of the said agreement, the said Paul Durai occupied the property and paid a sum of Rs.1,500 towards rental advance. After Chitramahal Krishnamoorthy vacated the first floor, it was kept vacant under lock and key by the 1st defendant. The said Perumal Nadar approached the 1st defendant to purchase the suit property through a broker namely Palanichamy in the year 1978. The first defendant agreed to sell the suit property for a consideration

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of Rs.2,70,000/- to the said Perumal Nadar. Apart from the said amount, Perumal Nadar agreed to pay a sum of Rs.40,000/- towards estimated tax on capital gains and that it was agreed between the parties that the sale should be completed on or before December 31, 1978.

The trial Court has dismissed the case of the plaintiff on the ground that non-examination of Perumal Nadar and Paul Durai is fatal to the case of the plaintiff.

When the matter came up before the Division Bench of this Court, it was contended by the learned Senior counsel for the defendants that the plaintiff cannot rely on the contradictions in the defendant to sustain his case. Rejecting the case of the appellant, it has been held by the Division Bench of this Court that:

> In a suit for specific performance of the contract, the onus is on the plaintiff to prove the contract, unless its existence is admitted by the Opposite Party. When the plaintiff fails to prove the contract, the mere fact, that the defendant admits receipt of money but on altogether different account, does not shift the burden of proof to the defendant.

It has been further held that the case of the plaintiff must stand or fall on his own merits not on defendant's case.

The facts of the above said case will not be applicable to the present facts of the case. In the case on hand, the suit is for an order of for permanent injunction. It is a definite case of the plaintiff that she is in possession of the suit house. The defendant in the written statement also contended that he is in possession of the suit property. In support of her contention the plaintiff has filed Ex.A.1 to A4 and Ex.A.7 to show her possession in respect of the suit property. On the other hand, the documents produced by the defendant are all subsequent to the filing of the suit. Only under such circumstances, the learned trial judge has come to a conclusion that prima facie the plaintiff has proved her possession in respect of the suit property and that the balance of convenience is on the side of the plaintiff to grant an order of permanent injunction since the defendant is making attempt to disturb the peaceful possession and enjoyment of the suit property by the plaintiff.

6(f) The learned senior counsel appearing for the respondent relying on 2006(2) MLJ 453 (S.Parthasarathy Vs. Durai @ Govindasamy and others), contended that in a suit for bare injunction, it is sufficient to decide as to who is in possession of the suit property at the time of filing of the suit. However, the Court cannot confine its duty only to that extent, but has also to see as to whether the plaintiff establishes prima facie right over the property. The facts of the above said case in

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brief are as follows:-

"The plaintiff has purchased the suit land on 14.6.1969 under Ex.A.1-sale deed. Admittedly, at the time of the said purchase, the plaintiff was unemployed. It is also not in dispute that the plaintiff got employment only in the year 1980 and he was appointed as Kalasi in the Southern Railway. On 17.12.1967, the father of the parties died and later on, their mother also died on 18.10.1999. It is the case of the plaintiff that the defendants had forcibly obtained the signature of the plaintiff in Exs.A.13 & A.14 viz. Partition deed and agreement respectively. Hence, he gave a complaint to the police under Ex.A.17 on 14.3.1990. Admittedly, no action was taken on the said complaint given by the plaintiff against the defendants. Alleging interference by the defendants, the suit had been instituted for permanent injunction.

The defendants resisted the suit by saying that the plaintiff has no source of income at the time when the land was purchased under Ex.A.1 on 14.9.1969 and that the father of the parties was the only earning member and he had purchased the same by paying the sale price in instalments, in the name of the plaintiff, since the plaintiff was the only major son as well as eldest among other sons and daughter. It is also the case of the defendants that after purchase of the land, they have sold some of the ancestral proeprties under Exs.B.9 to B.11, sale deeds, dated 13.5.1974, 3.5.1974 and15.4.1974 respectively and utilised the sale consideration for construction of the building, which was constructed in the land purchased under Ex.A.1. It is the further case of the defendants that they have paid the instalments payable to the Society, where the land under Ex.A.1 was purchased.

After considering the oral and documentary evidence adduced by both parties, the trial Court dismissed the suit, against which, the plaintiff has filed A.S.No.174/1994 and the first appellate Court has also dismissed the appeal confirming the judgment and decree of the trial Court. Hence, the second appeal before this Court.

While disposing the said second appeal, A Division Bench of this Court has observed that in a suit for bare injunction, it is sufficient to decide as to who is in possession of the suit property at the time of filing of the suit. However, Court cannot confine its duty only to that extent; but has also to see as to whether the plaintiff establishes prima facie right over the property. It has been further held that this Court while exercising its power under Section 100, C.P.C., finds no substantial question of law involved in the second appeal and ultimately dismissed the second appeal."

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It is further pertinent to note in the case that since the possession of the plaintiff in respect of the suit property has been disturbed by the defendant, the plaintiff has preferred a complaint with J-3 Police in Cr.No.37/1987 is seen from Ex.A.6. Under such circumstances, I do not find any reason to interfere with the findings of the learned first appellate Court in A.S.No.34/1995 on the file of the Court of Subordinate Judge, Thiruvallure. Points are answered accordingly.

7. In the result, the Second Appeal is dismissed confirming the decree and judgment in A.S.No.34/1995 on the file of the Court of Subordinate Judge, Thiruvallur, with costs through out. Connected CMP.No.4959 of 1997 is also dismissed.

ssv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,
1.The Subordinate Judge, Thiruvallure

2.The District Munsif, Ponneri.

3. The Record Keeper,
V.R.Section, High Court, Madras.

+1 cc to Mr.N.R.Gopalan, Advocate Sr.No.6252.

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dcp/21.6.07

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